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BEFORE THE ARIZONA CORPORATION COMMISSION

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JEFF HATCH-MILLER, Chairman

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AZ CORP COMMISSION
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IN THE MATTER OF THE APPLICATION OF
ARIZONA WATER COMPANY FOR AN
EXTENSION OF THE SERVICE AREA UNDER
ITS EXISTING CERTIFICATE OF
CONVENIENCE AND NECESSITY TO PROVIDE
WATER UTILITY SERVICES.

DOCKET NO. W-01445A-03-0559

PROCEDURAL ORDER

BY THE COMMISSION:

In Decision No. 66893 (April 6, 2004), the Arizona Corporation Commission ("Commission") granted Arizona Water Company's ("Arizona Water") application for an extension of its Certificate of Convenience and Necessity ("CC&N") for its Casa Grande system, subject to certain conditions.

AWC was ordered to file (1) a copy of the Developers' Assured Water Supply for each development with the Commission within 365 days of the Decision and (2) a main extension agreement associated with the extension area within 365 days of the Decision.

On March 30, 2005, AWC filed a Request for Additional Time to Comply with the Filing Requirement ("Request").

On April 5, 2005, a Procedural Order was issued directing Staff to file response to the Request.

On April 11, 2005, Staff filed its Response.

On May 10, 2005, a Recommended Order was issued by the presiding Administrative Law Judge.

On May 19, 2005, Cornman Tweedy 560, LLC ("Cornman Tweedy") and Picacho Water Company ("Picacho") filed a request to intervene

The Recommended Order was discussed, but not decided by the Commission at its May, 2005 Open Meeting.¹

¹ By Procedural Order in Docket No. W-03528A-05-0281, the parties were directed to make a good faith effort to resolve this matter.

1 By Procedural Order issued September 28, 2005, the Commission's Legal Staff was directed
2 to file a legal memorandum or brief on the issue of the validity of the CC&N.

3 On October 5, 2005, Picacho filed a Notice of Appearance of Counsel; Motion to
4 Consolidate; Request to File Brief on the Issue of Whether Arizona Water Company's CC&N is Null
5 and Void and Request For Oral Argument; and Request for Ruling on Motion for Intervention.

6 On October 14, 2005, Arizona Water filed its Response to Picacho Water Company's Motion
7 to Consolidate; Request to File Brief and Request for a Ruling.

8 On October 24, 2005, Picacho Water Company filed its Reply in Support of its Motion to
9 Consolidate, Request to File Brief, and Request for Ruling on Motion to Intervene.

10 By Procedural Order issued November 14, 2005, Cornman Tweedy was granted intervention,
11 Picacho was denied intervention, and a procedural conference was set for November 21, 2005.

12 The procedural conference was held as scheduled.

13 On November 22, 2005, the Commission's Staff filed its Legal Memorandum Pursuant to the
14 September 28, 2005 Procedural Order ("Staff's Legal Memorandum"). Staff's Legal Memorandum
15 concluded that Decision No. 66893 granted a CC&N to Arizona Water; the "null and void" language
16 in the decision did not automatically divest the CC&N; and that an interest exists in the CC&N that is
17 protected by due process, including an opportunity for notice and hearing.

18 On December 19, 2005, Arizona Water and Cornman Tweedy each filed their Responses to
19 Staff's Legal Memorandum.

20 On January 9, 2006, Staff filed its Reply to Parties' Responses.

21 On February 17, 2006, Cornman Tweedy filed correspondence concerning data requests.

22 On February 24, 2006, Cornman Tweedy filed a Request to Set Hearing Date.

23 On March 7, 2006, Cornman Tweedy filed a Motion to Compel Discovery.

24 On March 16, 2005, Arizona Water filed its Response to Request to Set Hearing Date;
25 Response to Motion to Compel; Motion for Procedural Conference; and Request for Additional Time
26 to Comply with Filing Request.

27 At the November 21, 2005 procedural conference, Cornman Tweedy indicated that it adopted
28 the Motion made by Picacho to consolidate this matter with Picacho's pending application for an

1 extension of its CC&N,² additional oral arguments were heard on the Motion, and timeframes for
2 filing additional arguments were discussed.³ Also discussed at the procedural conference were
3 timeframes for responses to Staff's Legal Memorandum on the issue of whether the Certificate of
4 Convenience and Necessity granted in Decision No. 66893 is null and void.

5 Motion to Consolidate

6 The Motion to Consolidate filed October 5, 2005, requested that the Commission consolidate
7 this Arizona Water docket with Picacho Water's application for a CC&N (Docket No. W-03528A-
8 05-0281). According to the Motion, the central issue is the same in both dockets – whether the
9 CC&N granted to Arizona Water in Decision No. 66893 remains in effect. The Motion also argues
10 that the parties' rights will not be prejudiced and that issues concerning the burden of proof would be
11 addressed in an evidentiary hearing.

12 In Arizona Water's Response to the Motion, it argues that the attempts to reverse the
13 Commission's decision constitute an improper collateral attack on Decision No. 66893. Arizona
14 Water also argues that the requirements of A.A.C. R14-3-109(H) are not met because the issues in the
15 two matters are not substantially the same. Arizona Water states that in this docket, the "central
16 remaining issue is whether a developer and its own captive water company may frustrate that well-
17 supported and non-appealable finding of the public interest at this late stage by unilaterally
18 preventing the occurrence of certain events with the timeframes established by the Commission.
19 While the stakes are substantial, they hinge on a relatively simple legal question created by the
20 developer's own actions to obstruct Arizona Water Company's performance by a deadline included
21 in a previously granted CCN." Arizona Water also argues that the second prong of A.A.C. R14-3-
22 109(H) is not met because consolidation would cause severe prejudice to Arizona Water.

23 In its Reply in support of its Motion, Cornman Tweedy argues that it is not seeking to
24 collaterally attack Decision No. 66893, but that it would like the Commission to enforce it as written.

25 During the procedural conference, counsel for Cornman Tweedy was unable to articulate how
26

27 ² Docket No. W-03528A-05-0281.

28 ³ Cornman Tweedy was given until November 28, 2005 to file any additional supplemental arguments on the Motion to Consolidate, and on that date, filed a Notice of Appearance of Counsel that indicated that Cornman Tweedy stood on the Motion and arguments made by Pichaco Water, and made no supplemental argument. On December 7, 2005, Arizona Water filed its Adoption of Previous Briefing Regarding Cornman Tweedy, LLC.

1 Pichaco Water's CC&N application was related to the question in this proceeding, which is "why has
2 Arizona Water not complied with the conditions in Decision No. 66893 and do those reasons merit an
3 extension of time for Arizona Water to comply?" (November 21, 2005 Tr. pp 24-26.) The issue
4 before the Commission currently is not which company should be providing service in the area, but
5 rather, whether an extension of time to comply with conditions should be granted. Intervention was
6 granted to Cornman Tweedy because it owns property in the affected area, and can potentially
7 provide evidence and testimony from its experience as to whether Arizona Water has taken steps to
8 comply with the conditions in Decision No. 66893 or refused or delayed in providing it service.
9 Accordingly, the Motion to Consolidate should be denied.

10 CC&N Status

11 In Staff's opinion as set forth in its Memorandum, Reply, and oral argument, Arizona Water
12 continues to hold a valid CC&N for the extension area. Staff argues that Decision No. 66893's
13 language that the Decision is null and void in the event the conditions are not met does not
14 automatically divest the CC&N under the circumstances involved in this case.

15 Arizona Water joined in Staff's position that due process requires Arizona Water to be given
16 notice and the opportunity to be heard prior to taking action affecting its CC&N extension. Arizona
17 Water asserts that the grant of a CC&N "creates a vested property right similar to a contract between
18 the utility and the State", citing Application of Trico Electric Cooperative, Inc., 92 Ariz. 373.
19 Arizona Water argues that Cornman Tweedy should not be allowed to intentionally block and
20 frustrate the occurrence of a condition subsequent that would result in the automatic forfeiture of the
21 constitutionally-protected CC&N rights. Arizona Water further argues that the Commission has
22 previously regularly granted extensions of time to comply and has even disregarded the failure of
23 such conditions related to other CC&Ns. Arizona Water requested that the Commission approve its
24 Request for Additional Time to Comply or rule that the conditions have been discharged by Cornman
25 Tweedy's bad faith conduct and no longer form a basis upon which the CC&N can be challenged.

26 Cornman Tweedy argues that the Commission has authority to issue decisions requiring
27 compliance with conditions. However, it distinguishes the facts of the Trico case from this
28 proceeding, stating that Trico had fully vested rights in the territory, and here, Arizona Water had not

1 obtained a fully vested right to serve. Cornman Tweedy argues that self-executing language
2 automatically rendering a CC&N null and void is valid and enforceable. It asserts that Arizona Water
3 had its notice and procedural due process rights at the time the Commission entered Decision No.
4 66893. Cornman Tweedy also argues that filing a request one week prior to the expiration of the
5 deadline "does not save [Arizona Water] from the operation of the plain language of the decision."
6 Finally, Cornman Tweedy argues that failure to adhere to the language of the decision would
7 undermine good regulatory policy.

8 In its Reply to Arizona Water and Cornman Tweedy's Responses to Staff's Legal
9 Memorandum, Staff argues that there is no "contract" between the company and the state, and cites to
10 US West Communications, Inc. v. Arizona Corp. Comm'n, 197 Ariz. 16, 3 P.3d 936 (App. 1999) and
11 Phelps Dodge Corp. v. Arizona Elec. Power Coop., Inc., 207 Ariz. 95 (App. 2004). Staff also
12 disagrees with Arizona Water's position that it has a "vested property right" in its CN&N, and states
13 that "[n]either the Phelps Dodge or US West opinions, nor Article 15, Section 7 state that a utility has
14 a vested property right in a CC&N granted under A.R.S. § 40-281, 282." Staff's January 9, 2006
15 Reply, p. 3. In response to Cornman Tweedy's arguments, Staff states that it does not dispute that in
16 appropriate circumstances where a compelling interest exists, a CC&N order may become null and
17 void if the conditions are not met. But Staff states that the facts of this case are not such that Arizona
18 Water should be denied notice and an opportunity to be heard. Staff also points out that there is no
19 language in the Decision prohibiting notice and hearing, and that none of the cases cited by Cornman
20 Tweedy include the word "automatically" before "null and void". Staff concludes that Arizona
21 Water's procedural due process rights do not confer either a CC&N contract or a vested property
22 right.

23 Staff notes that Arizona Water timely filed a Request for Additional Time to Comply with the
24 conditions, making its filing prior to the expiration of the 365 day period for compliance. What has
25 not been noted by the parties is that a Procedural Order was issued on April 5, 2005, directing the
26 Commission's Staff to respond to the Request for Additional Time to Comply on or before April 11,
27 2005. Accordingly, the filing of the Request for Additional Time to Comply, and the issuance of the
28 April 5, 2005 Procedural Order have stayed the time deadlines contained in Decision No. 66893 until

1 further order of the Commission on the Request for Additional Time to Comply. Consequently,
2 Arizona Water's CC&N for the extension area remains in effect pending such ruling.

3 Further, as Staff recommends, it is appropriate to provide Arizona Water an opportunity to be
4 heard on its request for additional time for compliance, prior to any action that may be taken by the
5 Commission. Although the pleadings filed to date have provided information as to why Arizona
6 Water has not complied, that information is not sworn testimony or evidence, and the parties have
7 not, to date, stipulated to facts. Accordingly, an evidentiary hearing should be scheduled to hear
8 testimony and evidence on the circumstances and events that have resulted in Arizona Water not
9 complying with the time periods established in Decision No. 66893. The hearing will not be a
10 reopening of the Decision granting Arizona Water a CC&N and will not address whether a different
11 water utility should be providing service to the extension area. Staff should also be prepared to
12 provide testimony explaining why such time periods for compliance are recommended and included
13 in Commission decisions, how the determination is made as to how long to give for compliance, how
14 requests for additional time to comply are analyzed by Staff, and any other relevant policy issues that
15 need to be addressed in this proceeding.

16 Accordingly, a procedural conference should be held to discuss the issues related to
17 discovery, and to set a date for the evidentiary hearing.

18 IT IS THEREFORE ORDERED that the Motion to Consolidate is denied.


19 IT IS FURTHER ORDERED that Arizona Water Company's Request for Additional Time to
20 Comply and the Procedural Order issued April 5, 2005 have stayed Decision No. 66893's time for
21 compliance with the conditions until further order of the Commission, and Arizona Water Company's
22 Certificate of Convenience and Necessity for the extension area remains valid and in effect until the
23 Commission makes a ruling on the Request for Additional Time to Comply.

24 IT IS FURTHER ORDERED that a **procedural conference** shall be held on **April 3, 2006, at**
25 **1:30 p.m.**, or as soon thereafter as is practical, at the Commission's offices, 1200 West Washington
26 Street, Arizona 85007.

27 IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113 - Unauthorized
28 Communications) remains in effect.

1 IT IS FURTHER ORDERED that the Presiding Officer may rescind, alter, amend, or waive
2 any portion of this Procedural Order by subsequent Procedural Order.

3 DATED this 22 day of March, 2006
4

5
6 
7 LYN FARMER
CHIEF ADMINISTRATIVE LAW JUDGE

8
9 Copies of the foregoing mailed/delivered
this 22 day of March, 2006 to:

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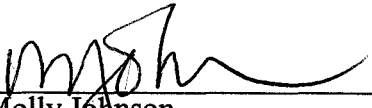
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